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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MORTEZA NAVID BAKHTIARI, Defendant and Appellant.	G038923 (Super. Ct. No. 06HF0144) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseno, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Robin Derman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Morteza Navid Bakhtiari of attempted murder without premeditation, assault with a deadly weapon (two counts), hit and run with injury, hit and run with property damage, and falsely reporting a crime. The jury also found true that defendant inflicted great bodily injury. The trial court sentenced him to a 15-year term.

In his appeal defendant contends that (1) there was no substantial evidence supporting the attempted murder count; (2) the trial court erred in failing to instruct on voluntary manslaughter; (3) the trial court erred in failing to fully instruct the jury on provocation, sudden quarrel, and heat of passion; (4) the trial court erred in excluding certain opinion testimony of an expert; and (5) there was prosecutorial misconduct. We disagree with each of these contentions and affirm the judgment.

FACTS

John Royston, Dan Zeleznik, and Christopher Herr went to a restaurant in Aliso Viejo, arriving early in the evening. They each drank a number of alcoholic beverages until 11:00 or 11:15 p.m. From the first restaurant they went to another across the parking lot of the first. As they were walking away from the second restaurant they saw defendant driving a BMW in the parking lot at high speed. They yelled at defendant to slow down. Thereupon they saw defendant hit a Mercedes parked in front of their truck and take off. Royston threw a soda at the BMW.

After examining the damage to the Mercedes, the three men were approaching their truck when they saw defendant driving back towards them. Defendant stopped his vehicle at the next aisle across from the three men. As the three continued to walk towards their truck, Herr told defendant that "[you] just hit a parked car, what's wrong with you?" When Herr and Royston reached the right side of the truck, they heard the BMW coming back towards them. The BMW sounded as if it was speeding in low

gear. As Herr moved his body as close to their truck as possible, the BMW passed him and then struck Royston in the right leg or groin area, flipping him up onto the BMW. Royston had been moving towards the truck when he was hit. After hitting him, defendant drove away.

Mathew Rice, defendant's friend, testified against him after being granted immunity. The two of them were together the evening of the described events. Defendant drove his BMW. Rice described their visit to the same restaurant first visited by the victims. There was no evidence that either of them had any contact with the victims while in the restaurant.

Rice further testified that, after leaving the restaurant, defendant approached a stop sign where a van was stopped. Defendant became agitated and honked his horn several times. Rice tried to dissuade defendant from doing so. While they were stopped, Royston, Herr, and Zeleznik walked by and yelled at them. Rice suggested to defendant they leave the scene. The window on the driver's side of the BMW was open and someone threw a soda into the car. Rice believed it was Royston who threw it. Defendant, who was breathing heavily, put the car into reverse, backed up, put the car in drive, and drove towards the three men. Defendant then hit a cement border and ran into a Mercedes.

According to Rice, after hitting the Mercedes, defendant stated, "They messed up my car, and I can't have that. . . . They messed up my car. They messed up my car. I'm going to mess them up." He then turned his car around and drove into Royston. Rice stated that Royston was not in the path of the BMW. Royston appeared to attempt to get out of defendant's way, moving backward and to the side with his hands out, palms open, and mouth open; he seemed to be attempting to signal defendant to stop the BMW. The BMW hit Royston in the legs and then his head hit the windshield, shattering it. Royston's arm dented the pillar between the windshield and the right front

window. His body then slid off the car on the passenger side, breaking the mirror. Defendant did not stop his car.

Anthony Trueba, a former coemployee of Rice, testified that Rice came to his house the afternoon after the commission of the crime. Rice stated to him that he had been intoxicated at the time. Rice told him that, after liquid was thrown at them, defendant "went berserk, put his vehicle in reverse, and aimed at them[.]" He missed and hit a Mercedes. Defendant then stated, that those "mother fuckers made me hurt my car, now I'm going to hurt them[.]" Rice also told Trueba that defendant "circled around, stepped on it, got into second gear and then tagged that guy."

Defendant testified. He denied having consumed alcohol other than a few sips of beer. Once he left the restaurant, he pulled up behind a van at a stop sign. After about 20 seconds, he honked his horn. Later, he honked again. He then saw four or five men near his car, one of whom started to curse at him and threatened to kill him. Because he was confused and scared, defendant then backed up his car past the men. The man who had been cursing him, tossed a soda in his face, blinding him, which caused his car to run into a parked Mercedes.

Defendant first started to drive away but then decided he wanted the men to pay for the damage to his car because they had caused him to drive into the Mercedes. He intended to call the police. Three men then ran at him and he turned away to escape; he claimed did not see Royston before hitting him.

DISCUSSION

1. There was substantial evidence of intent.

Defendant contends that there was no substantial evidence to support a finding that he intended to kill Royston. He notes that "attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward

accomplishing the intended killing" (*People v. Lee* (2003) 31 Cal.4th 613, 623), and that the record does not support a specific intent to kill Royston. He argues that reckless driving does not raise an inference of specific intent to murder.

But here there was a great deal more than reckless driving. The statement attributed to defendant by Rice, "[t]hey messed up my car, and I can't have that. . . . They messed up my car. They messed up my car. I'm going to mess them up," and its less elegant version described by Rice to Trueba, "those mother fuckers made me hurt my car, now I'm going to hurt them[,]" together with defendant's conduct supports the inference that defendant meant to run down, not only Royston, but his companions as well. The intent to kill can rarely be established by defendant's statements. But considering all the circumstances, the jury was well justified in concluding that he intended to kill.

"'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citations.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

The very statements made by defendant demonstrate premeditation. Defendant, before driving at Royston, shifted to a lower gear to aid acceleration and drove at him with sufficient speed to lift Royston's body onto the hood of the car and shatter the windshield. Together with the statements, this supplies sufficient circumstantial evidence of defendant's intent to kill. We agree with the Attorney General that cases such as *People v. Smith* (1998) 37 Cal.4th 733, 742, *People v. Lashley* (1991) 1 Cal.App.4th 938, 945, and *People v. Lee* (1987) 43 Cal.3d 666, 677 all support this

conclusion. In each of these cases, the fact that defendant fired a gun at close range was sufficient to supply evidence of an intent to kill. Deliberately driving a car at substantial speed at the victim permits a similar inference.

2. There was no error in the failure to instruct on attempted voluntary manslaughter and on provocation.

Defendant contends the court erred in failing to instruct on the lesser included offense of voluntary manslaughter and "failing to fully instruct the jury on provocation, sudden quarrel, and heat of passion . . . ." (Bold, capitalization and underscoring omitted.)

Voluntary manslaughter is a lesser included offense of murder and attempted voluntary manslaughter is a lesser included offense of attempted murder. (See *People v. Montes* (2003) 112 Cal.App.4th 1543, 1545.) Relying on *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709, the Attorney General argues there is no obligation to instruct on the lesser included offense "when a defendant completely denies complicity in the charged crime, as here." That argument is misplaced, however. In *Gutierrez* defendant denied having fired the gun. Here defendant admitted being the driver of the vehicle that hit Royston.

But there are at least two reasons why an instruction on attempted voluntary manslaughter would have been inappropriate here. Any provocation, the thrown soda and the threats, occurred in response to defendant's criminal conduct in speeding in the parking lot and attempting to leave the scene after hitting the Mercedes. Acts under such circumstances do not entitle a defendant to an instruction on the lesser included offense. (See, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 306, overruled on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn.3.) Furthermore, defendant's statement that he would "mess up" his victims when he became enraged after hitting the Mercedes demonstrates a desire for revenge, which does not qualify as a passion that will reduce a

killing to manslaughter. (*People v. Bufarale* (1961) 193 Cal.App.2d 551, 562.) "'[T]he fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear *and never, of course, the passion for revenge*—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.'" (*People v. Valentine* (1946) 28 Cal.2d 121, 139, italics added, quoting from *People v. Logan* (1917) 175 Cal. 45, 49; accord, *People v. Berry* (1976) 18 Cal.3d 509, 515.) For the same reasons defendant's argument that the court should have instructed on "provocation, sudden quarrel, and heat of passion" as negating malice must fail. Provocation in response to defendant's criminal conduct and a passion for revenge do not negate malice.

But even if we ignore the above noted authorities, any error in failing to give the instruction on the lesser included offense was invited.

Appellant relies on *People v. Breverman* (1998) 19 Cal.4th 142, where the defendant was convicted of second degree murder. The trial court did not instruct on a heat of passion theory of voluntary manslaughter. The Supreme Court stated that the '"obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present . . . ."' (*Id.* at p. 154.) But here counsel advised the court that the instruction should not be given, stating that his client had charged him to make such a request. The court asked whether this was a tactical decision, "you want the jury to be put in a position of it's an all-or-nothing kind of situation." Defendant's counsel acknowledged that this was the case and that to the extent the court considered it a "tactical or strategy decision," it was defendant's decision and not counsel's, who had advised against it. We must assume that counsel, in his advice to his client, explained the risks involved in this decision.

People v. Duncan (1991) 53 Cal.3d 955 noted that "[t]he obligation to instruct on lesser included offenses exists even when a defendant, as a matter of trial tactics, objects to their being given." (*Id*. at p. 969.) But the *Duncan* court went on to note that "the doctrine of invited error will operate to preclude a defendant from gaining reversal on appeal because of such an error made by the trial court at the defendant's behest. [Citations.]" (*Id*. at p. 969.) *People v. Barton* (1995) 12 Cal.4th 186, 198 is to the same effect and was discussed at length by the *Breverman* court without a hint of disapproval. And in *People v. Valdez* (2004) 32 Cal.4th 73, although the court rejected application of the invited error doctrine because of an ambiguous record, the court once again endorsed the existence of the doctrine. (*Id*. at pp. 115-116, citing *People v. Cooper* (1991) 53 Cal.3d 771, 830.)

The only difference between the cases dealing with invited error in this context and the present case is that here defendant's counsel allegedly transmitted a tactical decision made by his client rather than his own. We doubt that the decision to take an all-or-nothing approach can be accomplished in such a fashion as to place defendant in a "heads I win; tails you lose" situation, the situation with which defendant provides us here. We are not privy to communications between counsel and his client dealing with this decision. And we are not here considering any claim of ineffective assistance of counsel because such a case is more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

3. The trial court did not abuse its discretion in limiting the testimony of an accident reconstruction expert.

After conducting a hearing pursuant to Evidence Code section 402, the court ruled that the expert could testify to where defendant's car hit the victim and how this related to the movement of the car. It also ruled that the expert could not express an opinion that the victim was moving at a certain rate of speed and the direction of his

movement. It was concerned the latter opinion was based on reports of some witnesses and that permitting the expert witness to select facts from some of these conflicting reports would constitute expert opinion on the credibility of witnesses. Defendant claims this precluded him from demonstrating "that [the victim] was stepping forward at the point of impact, that [defendant's] view of him was obstructed, and that [defendant's] steering action was consistent with trying to avoid the impact." The expert was permitted to testify as to the measurements of the vehicles; but his opinion as to whether defendant's view was limited was excluded.

As the Attorney General notes, """As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]"' [Citations.]" (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512.) The items excluded from the expert's testimony were not based on any physical evidence. We cannot conclude the trial court abused its discretion by its concern that, in permitting the expert to impliedly vouch for the truth of some witness statements he would, in effect, testify to the credibility of some of the witnesses. "The expert is not allowed to give an opinion on whether a witness is telling the truth because the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact. [Citation.]" (*People v. Long* (2005) 126 Cal.App.4th 865, 871.)

As to the exclusion of the expert's opinion regarding visibility, since the expert testified to the various measurements involved, this was an issue the jury could resolve without the use of expert testimony. (See *People v. Torres* (1995) 33 Cal.App.4th 37, 47 ['"Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates]'".)

4. Defendant waived prosecutorial misconduct, if any.

Defendant characterizes some statements made by the prosecutor during closing argument as misconduct. Without agreeing with this characterization, we note that defendant did not object to these statements and failed to request a curing instruction. We agree with the Attorney General that, under these circumstances, a defendant who waits until the appeal to first raise the objection waives his right to object. "'[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.